PD-0527-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/20/2018 3:31 PM
Accepted 11/20/2018 3:41 PM
DEANA WILLIAMSON
CLERK

No. PD-0527-18
IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/20/2018
DEANA WILLIAMSON, CLERK

ON REVIEW FROM THE COURT OF APPEALS FOR
THE NINTH DISTRICT OF TEXAS AT BEAUMONT
No. 09-16-00200-CR

JAMES ALLAN BURG, II

V.

THE STATE OF TEXAS

Arising from: **Cause No. 15-307592**
IN COUNTY COURT AT LAW NO. 1,
MONTGOMERY COUNTY, TEXAS

STATE'S BRIEF ON DISCRETIONARY REVIEW

BRETT W. LIGON
District Attorney
Montgomery County, Texas

NEEL KAPUR
SARA M. CORRADI
Assistant District Attorneys
Montgomery County, Texas

WILLIAM J. DELMORE III
Assistant District Attorney
Montgomery County, Texas
T.B.C. No. 05732400
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
E-mail: bill.delmore@mctx.org

IDENTITY OF PARTIES AND COUNSEL

District Attorney:	**BRETT W. LIGON** District Attorney Montgomery County, Texas
Counsel for the State in the trial court:	**NEEL KAPUR** **SARA M. CORRADI** Assistant District Attorneys Montgomery County, Texas
Counsel for the State in the court of appeals:	**JASON LARMAN** (former assistant district attorney, Montgomery County, Texas)
Counsel for the State in this Court:	**WILLIAM J. DELMORE III** Assistant District Attorney Montgomery County, Texas 207 W. Phillips, Second Floor Conroe, Texas 77301
Appellant:	**JAMES ALLAN BURG, II** Conroe, Texas
Counsel for the appellant in the trial court:	**JOSEPH J. LABELLA** (deceased; formerly maintained a law office at Conroe, Texas) **BRIAN C. BURNS** Attorney at Law 318 N. Main Conroe, Texas
Counsel for the appellant in the appellate courts:	**MATTHEW J. DELUCA** Attorney at Law 712 Main, Suite 2450 Houston, Texas 77002

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The appellant was charged in an amended information with the class A misdemeanor offense of driving while intoxicated (DWI) with a blood-alcohol concentration of 0.15 or more (C.R. 62, 67).[1] Upon his plea of not guilty, a jury found him guilty as charged, assessed his punishment at confinement in jail for one year and payment of a $1500 fine, and recommended that the sentence of confinement be suspended and that the appellant be placed under community supervision (C.R. 99). In addition, the trial court ordered the suspension of the appellant's driver's license for one year (C.R. 99; 7 R.R. 22-23).

The appellant gave notice of appeal, and the Court of Appeals for the Ninth District of Texas affirmed the judgment of conviction in an unpublished memorandum opinion. *See Burg v. State*, No. 09-16-00200-CR, 2018 WL 1747393 (Tex. App.–Beaumont Apr. 11, 2018, pet. granted) (mem. op., not designated for publication).

ISSUE PRESENTED

This Court granted review of the following issue: "Does a failure to object to a driver's license suspension at trial bar complaint on appeal?" Petition for Discretionary Review at p. 2.

[1] *See* Tex. Penal Code Ann. § 49.04(d) (West Supp. 2018).

STATEMENT OF FACTS

A state trooper stopped the appellant's vehicle after observing the appellant fail to dim his high-beam headlights for oncoming traffic (3 R.R. 63). After administering field sobriety tests, the trooper arrested the appellant for DWI (3 R.R. 96-97). The appellant refused to provide a specimen of his blood (3 R.R. 97-99), but a magistrate issued a search warrant (3 R.R. 103). An analyst determined that the specimen of blood obtained from the appellant contained 0.212 grams of alcohol per one hundred milliliters of blood (5 R.R. 58).

After a jury found the appellant guilty and assessed his punishment, the trial court directed that the judgment include a provision for the suspension of the appellant's driver's license for one year, to run concurrently with any previous administrative suspension (7 R.R. 22-24). The appellant did not object to the suspension order, though his attorney had ample opportunity to do so (7 R.R. 22-24):

> [PROSECUTOR]: For the judgment, how long do you want the probation?
>
> THE COURT: Eighteen months.
>
> [PROSECUTOR]: And which standard conditions? DWI, victim impact –
>
> THE COURT: Correct.
>
> [PROSECUTOR]: Ignition interlock since it was an A. How much community service, Your Honor?

THE COURT: Let's see, minimum is what, 22?

[PROSECUTOR]: We typically do 24 on a class C [sic], Judge.

THE COURT: Let's do 40 hours.

[PROSECUTOR]: Any driver's license suspension?

THE COURT: Yes. We're going have to have a suspension.

[DEFENSE COUNSEL]: Run concurrent with the ALR suspension.

THE COURT: It will, to run concurrent with the ALR suspension. Let's do the driver's license suspension for one year.

[DEFENSE COUNSEL]: One year driver's license suspension?

THE COURT: Yes, sir.

[PROSECUTOR]: Anything else as a condition that the Court would –

THE COURT: I don't think. Other than just standard conditions.

* * *

THE COURT: All right. James Burg, II, jury having found – of your peers having found you guilty of the offense of driving while intoxicated with a BAC of over .15 and recommending a sentence thereon which the Court is certainly going to follow, it will be the order and judgment of the Court that you will be – having been found guilty, it will be the judgment and sentence of the case that you will be assessed confinement in the Montgomery County jail for a period of one year. However, that will be probated and suspended and you'll be placed on community supervision for a period of 18 months under the terms and conditions set forth in the judgment.

> Also, I'm going to order a fine in the amount of $1500 and court cost in the amount $402.10. I'm also ordering your driver's license suspended for a period of one year, and the driver's license suspension will run concurrent with the ALR suspension, if any.
>
> Anything further?
>
> [PROSECUTOR]: Judge, the only thing I wasn't sure was I did the ignition interlock that's in the probation conditions. I wasn't sure the Court wanted the additional order that is sometimes done.
>
> THE COURT: Well, this is his first. You know, it's an A, but it's kind of unusual. I don't know that we have to have the requirement of an additional year because it's not within five years that he's had another one. So I don't think you would so I'm not going to order that because, as I understand it, it's for a second but the first has to have been within five years and there is no first.

In his brief in the court of appeals, the appellant argued that the trial court lacked the authority to suspend his driver's license pending his completion of a DWI educational program, citing *Love v. State*, 702 S.W.3d 319 (Tex. App.–Austin 1986, no pet.). In *Love*, the court of appeals held that a trial court lacked authority to suspend the defendant's driver's license as a condition of his probation—pending completion of the DWI educational program—under the provisions of former article 6687b(g)(1), Vernon's Annotated Civil Statutes (repealed effective September 1, 1995).[2]

[2] At the time *Love* was decided, section 24(g)(1) of article 6687b unambiguously stated that "the Department [of Public Safety] may not, during the period of probation, suspend the driver's license . . . of a person if the person is required under Section 6c, Article 42.13, Code of Criminal Procedure, 1965, to

Because the appellant was relying heavily upon *Love*—a case involving a condition of probation—former appellate counsel for the State responded in a reply brief that the appellant was required to object in the trial court to a license suspension imposed as "a condition of the appellant's community supervision." State's Appellate Brief at 17. And the court of appeals apparently was also misled by the parties' arguments, characterizing the issue as whether "the trial court erred by imposing a one-year driver's license suspension as a condition of his community supervision." *Burg*, 2018 WL 1747393, at *7. The court of appeals concluded that because the appellant had not objected to the suspension order in the trial court, he "cannot complain about the alleged condition [of community supervision] for the first time on appeal," citing *Speth v. State*, 6 S.W.3d 530 (Tex. Crim. App. 1999). *Id.*

---

attend and successfully complete an educational program designed to rehabilitate persons who have driven while intoxicated." *Love*, 702 S.W.2d at 320.

Implicitly acknowledging that article 6687b has been repealed, the appellant cites the current section 521.344(d) of the Transportation Code, which pertains to revocation rather than suspension of a driver's license. *See* Tex. Transp. Code Ann. § 521.344(d) (West 2018).

The Transportation Code draws a distinction between license suspensions (which are for a period of up to one year) and license revocations (which are indefinite in duration). *See* Tex. Transp. Code Ann. § 521.312 (West 2018). Thus it is not at all clear that subsection (d) restricts a trial court's authority to *suspend* a driver's license, as opposed to the Department of Public Safety's authority under subsection (e) to *revoke* a license for failure to timely complete the DWI educational program.

SUMMARY OF THE STATE'S ARGUMENT

The appellant correctly argues that the order suspending his driver's license was not a condition of his community supervision; but he incorrectly argues that it was an illegal sentence which can be challenged for the first time on appeal. A driver's license suspension is not "punishment" for an offense, and the suspension order was not part of the trial court's "sentence."

The appellant forfeited his challenge to the suspension order under Rule 33.1 of the Rules of Appellate Procedure, because a defendant's right to be free from an unauthorized collateral consequence of a criminal conviction is not like the category-two rights which must be affirmatively waived under *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). The Transportation Code statutes govern-ing license suspension are not directed to the trial court and do not set out fundamental trial rights which a trial court has an independent duty to implement. A driver's license suspension order is most analogous to a restitution order, and this Court has held that a challenge to the trial court's authority to order restitution is waived by the failure to object to the order in the trial court.

ARGUMENT AND AUTHORITIES

a. The driver's license suspension was not imposed as a condition of probation.

It appears that the court of appeals erred in holding that the appellant's driver's license suspension was imposed as a condition of his community

supervision. *See Burg*, 2018 WL 1747393, at *7. The appellant correctly notes that the list of conditions of community supervision appended to the judgment (C.R. 101-03) includes no mention of the suspension. Appellant's Brief on the Merits at pp. 5-6. A notation of the license suspension instead appears on the first page of the judgment, separate and apart from the conditions of probation (C.R. 99). During the colloquy regarding preparation of the judgment (set out verbatim in the Statement of Facts, *supra* at pp. 2-4), the topic of driver's license suspension came up during a discussion of the conditions of probation, but that fact alone seems insufficient to convert the suspension order into a condition of community supervision.

Therefore, it appears that the court of appeals was incorrect in holding that the suspension was a condition of probation and that the appellant forfeited his appellate argument by failing to object to a condition of probation in the trial court.

b. The license suspension was not an unlawful "sentence" for the purpose of error preservation analysis.

The appellant argues in his brief in this Court that his "right to a lawful sentence was absolute and nonwaivable, and he could raise the issue for the first time on appeal." Appellant's Brief on the Merits at pp. 8-9. But while the license suspension order was not a condition of probation, it was not part of the appellant's "sentence," either.

"The sentence is that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law." Tex. Code Crim. Proc. Ann. art. 42.02 (West 2006). The sentence "consists of the facts of the punishment itself, including the date of commencement of the sentence, its duration, and the concurrent or cumulative nature of the term of confinement and the amount of the fine, if any." *State v. Kersh*, 127 S.W.3d 775, 777 (Tex. Crim. App. 2004).

The "suspension of a driver's license" upon conviction for an offense "is not punishment." *Grant v. State*, 989 S.W.2d 428, 432 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (holding that automatic suspension of a driver's license upon conviction for a drug offense under Transportation Code section 521.372[3] was not part of the "punishment" for the drug offense of which the defendant must be admonished in advance of his guilty plea). The suspension of a driver's license "is not intended as punishment but is designed solely for the protection of the public in the use of the highways." *Ex parte Arnold*, 916 S.W.2d 640, 642 (Tex. App.–Austin 1996, pet. ref'd).

This Court has stated that a complaint of an "illegal sentence" that is "outside the range of punishment authorized by law . . . may be raised at any time." *Ex parte Pue*, 552 S.W.3d 226, 228 (Tex. Crim. App. 2018). But because the

[3] *See* Tex. Transp. Code Ann. § 521.372 (West 2018).

appellant's license suspension was not "punishment" for his crime, the order of suspension was not part of the "sentence" imposed by the trial court, and the Court's holdings regarding "illegal sentences" are not controlling.

At least one court of appeals seems to have reached a contrary conclusion. In *In re C.E.M.*, 981 S.W.2d 771 (Tex. App.–Houston [1st Dist.] 1998, no pet.), the court of appeals held that an unauthorized driver's license suspension order was "analogous to a situation in which a trial court imposes a punishment not authorized by law," and was therefore "void." Although the defendant in *C.E.M.* had not challenged the trial court's authority to order the suspension in his appellate brief, the court of appeals characterized the order as "unassigned fundamental error," *id.* at n.2; and it deleted it from the judgment on its own motion. Respectfully, the holding in *C.E.M.* conflicts with decisions finding that license suspension is remedial in nature and is not "punishment." And it also conflicts with decisions holding that license suspension is merely a "collateral consequence" of a conviction, and that a defendant's ignorance of a license suspension requirement therefore does not affect the knowing and voluntary nature of his guilty plea. *See, e.g., Beavers v. State*, No. 09-99-360 CR, 2000 WL 800567, at *1 (Tex. App.–Beaumont June 21, 2000, no pet.) (not designated for publication); *Grant*, 989 S.W.2d at 432; *Free v. State*, No. 04-97-00137-CR, 1998 WL 82924, at *2 (Tex. App.–San Antonio Feb. 27, 1998, no pet.) (not designated

for publication); *accord*, *Ex parte Morrow*, 952 S.W.2d 530, 539 (Tex. Crim. App. 1997) (citing driver's license suspension as an example of "collateral consequences" of which a defendant need not be admonished).

c. The appellant's license suspension complaint was not preserved for review under Rule 33.1.

Because the license suspension order was neither a condition of probation (as stated by the court of appeals) nor an "illegal sentence" (as argued by the appellant), it appears that the applicability of Rule 33.1 of the Rules of Appellate Procedure to the appellant's point of error is an open question that should be decided by categorizing the right asserted by the appellant within the framework of *Marin v. State*.

Rule 33.1 provides, "As a requisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion . . . ." The rule requires that a complaint be brought to the trial court's attention "at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).

However, Rule 33.1 does not apply to all appellate complaints. In *Marin*, this Court "held that the general preservation requirement's application turns on the nature of the right allegedly infringed." *Grado v. State*, 445 S.W.3d 736, 739 (Tex.

Crim. App. 2014). *Marin* separated a defendant's various rights into three categories:

- "The first category of rights are those that are widely considered so fundamental to the proper functioning of our adjudicatory process . . . that they cannot be forfeited . . . by inaction alone. These are considered absolute rights.

- "The second category of rights is comprised of rights that are not forfeitable—they cannot be surrendered by mere inaction, but are waivable if the waiver is affirmatively, plainly, freely, and intelligently made. The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver.

- "Finally, the third category of rights are forfeitable and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction."

Id. (internal quotations and footnotes omitted). The Rule 33.1 "preservation requirements do not apply to rights falling within the first two categories." *Id.*

"*Marin* places particular emphasis on the various respective 'dut[ies]' faced by trial judges and litigants in our adversarial adjudicatory system." *Proenza v. State*, 541 S.W.3d 786, 797 (Tex. Crim. App. 2017). In *Proenza*, for instance, the article 38.05 prohibition of judicial comments on the evidence was found to be a category-two right under *Marin* because it is "directed at the trial judge" and it is "'fundamental to the proper functioning of our adjudicatory system,' such that it should 'enjoy special protection on par with other non-forfeitable rights.'" *Id.* at 798-99 (quoting *Marin*, 851 S.W.2d at 278).

Proenza is consistent with other cases in which fundamental rules governing the manner in which a trial court conducts a criminal trial were found to create category-two rights which are not forfeited by inaction. *See, e.g., Grado*, 445 S.W.3d at 743 (defendant's right to consideration of the full range of punishment by the trial court); *Garcia v. State*, 149 S.W.3d 135, 144 (Tex. Crim. App. 2004) (defendant's right to interpreter to enable him to understand the court proceedings); *Morris v. State*, 554 S.W.3d 98 (Tex. App.–El Paso 2018, pet. ref'd) (defendant's right to be free from unnecessary electric shocks administered through stun belt in courtroom); *Hayes v. State*, 516 S.W.3d 649, 656 (Tex. App.–Houston [1st Dist.] 2017, pet. ref'd) (defendant's right to be present in the courtroom for trial).

In this case, the provisions of section 521.344(d) are not primarily directed at trial courts, and they do not establish any sort of right that is fundamental to a fair trial. Section 521.344 is just one of many non-penal statutes which may be implicated in the punishment stage of criminal proceedings, including statutes pertaining to restitution, property forfeiture, and sex-offender registration. To hold that section 521.344 creates a *Marin* category-two right would amount to holding that Rule 33.1 does not apply to any judicial error regarding the terms of a collateral civil statute which may affect the consequences of a defendant's punishment. This would compromise the goals of the contemporaneous objection rule and frustrate the State's interests in the finality of judgments.

A restitution order is closely analogous to a license suspension order, as both constitute collateral consequences of a conviction that are not imposed as punishment for the crime. And this Court has held, "If a defendant wishes to complain about the appropriateness of (as opposed to the factual basis for) a trial court's restitution order, he must do so in the trial court, and he must do so explicitly." *Idowu v. State*, 73 S.W.3d 918, 921 (Tex. Crim. App. 2002). If Rule 33.1 applies to an erroneous restitution order, it should also apply to an erroneous license suspension order.

In this case, the appellant had ample opportunity to object to the suspension order; and instead of objecting, he asked that the suspension run concurrent with any previous administrative suspension. *See and cf. Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013) (defendant who lacked opportunity to object to restitution order in trial court could complain of order for first time on appeal). Because the appellant did not object and inform the trial court of the basis of his objection, he cannot challenge the order for the first time on appeal under Rule 33.1, and the court of appeals correctly overruled his point of error.

CONCLUSION AND PRAYER

It is respectfully submitted that all things are regular and the judgments of the court of appeals and the district court should be affirmed.

BRETT W. LIGON
District Attorney
Montgomery County, Texas

/s/ William J. Delmore III
WILLIAM J. DELMORE III
T.B.C. No. 05732400
Assistant District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
936-788-8395 (FAX)
E-mail: bill.delmore@mctx.org

CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4 (i)(2)(B) because there are 2,965 words in this document, excluding the portions of the document excepted from the word count under Rule 9(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

/s/ William J. Delmore III
WILLIAM J. DELMORE III
Assistant District Attorney
Montgomery County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served electronically upon counsel for the appellant and upon the office of the State Prosecuting Attorney on the date of the submission of the original to the Clerk of this Court.

/s/ William J. Delmore III
WILLIAM J. DELMORE III
Assistant District Attorney
Montgomery County, Texas